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UBER TECHNOLOGIES, INC. and OTTOMOTTO LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

WAYMO LLC,

Plaintiff,

v.

UBER TECHNOLOGIES, INC.,
OTTOMOTTO LLC; OTTO TRUCKING LLC,

Defendants.

Case No. 3:17-cv-00939-WHA

**DEFENDANT UBER
TECHNOLOGIES, INC.'S AND
OTTOMOTTO, LLC'S OPPOSITION
TO PLAINTIFF WAYMO LLC'S
RENEWED MOTION IN LIMINE 1**

Judge: The Honorable William Alsup
Trial Date: October 10, 2017

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

Waymo, through renewed motion *in limine* No. 1 (“MIL 1”) revives a motion it tentatively lost, and that it should lose again.¹ Waymo’s untenable premise is that it should have free rein to tell the jury its own preferred theory as to *why* Levandowski allegedly downloaded around 14,000 files in December 2015—but that Uber should be precluded from offering a competing explanation. There is no reason for this uneven result. MIL 1 should be denied again.

I. WHAT IS AT STAKE

Waymo’s theory of the case is that Levandowski downloaded approximately 14,000 files *because* he intended to steal those files and use them at Uber. (E.g., 5/3/2017 Hr’g Tr. 6:1–3 (“It is now clear, your Honor, that at the time of the download, Uber and Mr. Levandowski were planning to build a replica LiDAR system for Uber.”).) In service of this theory, Waymo has leveraged circumstantial evidence, including the timing of the downloads vis-à-vis meetings with Uber employees. (E.g., Dkt. 23 ¶ 48; 5/3/2017 Public Hr’g Tr. 34:21–22 (“the circumstantial evidence here clearly shows there’s bad intent”); 6/29/2017 Hr’g Tr. 89:22–90:1; Dkt. 756 at 8–13; Dkt. 1405 at 3, 15.) Waymo’s conspiracy theory is not true. But Uber, like Waymo, has been hamstrung in cross-examining Levandowski to prove *why* he did what he did because of his Fifth Amendment invocation. Thus, Uber, like Waymo, is left with inferences to be drawn from circumstantial evidence to rebut Waymo’s theory and posit alternative reasons for the jury.

Moreover, Waymo no doubt intends to argue that Uber waited too long to fire Levandowski. (E.g., 7/26/2017 Hr’g Tr. 71:17–72:4.) There are reasons for that: among other things, Uber reasonably believed that Levandowski’s downloads had nothing to do with Uber and everything to do with his disintegrating relationship with his then-employer, Google. The bonus explanation helps explain Uber’s actions after the filing of this Complaint, and sheds light on the state of mind of Uber’s employees, Board, executives, and former executives.

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¹ Waymo’s motion was denied without prejudice, and that the Court’s July 11 tentative order was not a final ruling in limine. (Dkt. 874, p. 3, ¶ 10.) However, the motion was denied subject “to *renewal via targeted objections raised against specific items of evidence at trial.*” (Dkt. 874, p. 3, ¶ 8.) This sweeping pretrial motion is not an objection made “at trial,” neither is it a “targeted objection raised against specific items of evidence”.

II. UBER HAS SUBSTANTIAL, ADMISSIBLE, CIRCUMSTANTIAL EVIDENCE THAT LEVANDOWSKI'S DOWNLOADS RELATED TO HIS BONUS

Uber acknowledges that the Court has excluded, on privilege grounds, the clearest evidence that Levandowski downloaded the files at issue in relation to his Google bonus: the fact that Levandowski said so. (Dkt. 1267.) But Waymo is wrong that Uber's "entire bonus theory" arose from this conversation. (MIL 1 at 1.) As Waymo acknowledges, Uber has substantial circumstantial evidence of this explanation. Google's Project Chauffeur Bonus Plan was [REDACTED]

[REDACTED] (Ex. 36, WAYMO-UBER-00047062; *see also* Ex. 55, 8/21/2017 J. Sorge Dep. Tr. 124:13–127:12, 130:5–133:4.) Moreover, [REDACTED]

[REDACTED] (*See* Dkt. 1089-6.) In the face of these misaligned incentives, [REDACTED] (Ex. 48, 4/20/2017 G. Pennecot Dep. Tr. 26:13–21), and [REDACTED]

[REDACTED]. (Ex. 57, 8/24/2017 C. Urmson Dep. Tr. 88:25–89:4, 100:13–101:17.) Levandowski repeatedly expressed his nervousness about whether he would be paid and how much—an anxiety shared by others on the Chauffeur team. (*See, e.g.*, Ex. 28, UBER00060504; Ex. 49, 6/16/2017 G. Pennecot Dep. Tr. 615:11–23; Ex. 51, 8/4/2017 D. Gruver Depo Tr. 208:16–209:9, 407:23–409:9; Ex. 57, 8/24/2017 C. Urmson Dep. Tr. 132:22–135:2.) Even after the valuation was purportedly set, [REDACTED]

[REDACTED] (Ex. 34, WAYMO-UBER-00033705.) First round bonuses were not paid until December 31, 2015—[REDACTED]

[REDACTED] And termination bonuses in August 2016 were likewise late; Levandowski expressed on August 12, 2016 that he was "expecting to be paid weeks ago." (Ex. 35, UBER00301332–39.) In the midst of this, Levandowski may well have taken the misguided step of downloading the entire contents of the SVN server in order to demonstrate the progress of the project, or for some other reason.

Waymo is also wrong that statements that Levandowski made to others about why he downloaded the materials are inadmissible hearsay. (MIL 1 at 3.) First, statements made by Levandowski when he was a Google employee are nonhearsay Google party admissions under Federal Rule of Evidence 801(d)(2)(A) and (D). Second, Levandowski's contemporaneous statements about his then-existing state of mind (such as his motive, intent, or plan) are exempted from the hearsay rule under Federal Rule of Evidence 803(3). Finally, Levandowski's statements to Uber employees on this topic would be offered not for the truth, but to show effect on the listener: they explain why Uber did not fire Levandowski immediately. Fed. R. Evid. 801(c); *Orsini v. O/S SEABROOKE O.N.*, 247 F.3d 953, 965 n.4 (9th Cir. 2001) (statements not hearsay when relevant to listener's "state of mind and the effects those statements had on him".)

Waymo may think this evidence is "weak" (MIL 1 at 4), but the "court may not exclude relevant evidence—or, in this case, assign it no probative value—on the ground that it does not find the evidence to be credible." *United States v. Evans*, 728 F.3d 953, 963 (9th Cir. 2013). And there is no substantial danger of unfair prejudice, confusing the issues, misleading the jury, undue delay or wasting time. Fed. R. Evid. 403. Waymo has not identified any prejudice to Waymo that does not also affect Uber. (MIL 1 at 3.) Far from being "irrelevant," the uncertainty surrounding the Project Chauffeur Bonus Plan explains *why* Levandowski downloaded the files. The Plan

[REDACTED] (Ex. 38, WAYMO-UBER-00041064.) Waymo no doubt seeks to make a trial theme of the number of ex-Googleers who joined Uber. Uber is entitled to explain that this exodus was a problem of Google's own making.

Finally, there is no danger of confusing or misleading the jury. Uber has never argued and would not claim before the jury that the bonus explanation is a "legitimate" reason for downloading. (MIL 1 at 4.) It may not exonerate Levandowski—but it does exonerate Uber.

III. WAYMO HAS NOT BEEN PRECLUDED FROM DISCOVERY AND UBER HAS COMMITTED NO MISCONDUCT

Waymo has not been "denied" discovery into the bonus explanation. (MIL 1 at 1.) Uber briefed the issue as early as June 28 (Dkt. 755 at 12), when discovery was in full swing, and the

1 parties discussed the issue in court on June 29. (6/29/2017 Hr’g Tr. at 89:20–90:6.) Waymo has
 2 questioned witnesses about this issue, including Levandowski himself (Ex. 51, 8/4/2017 D.
 3 Gruver Dep Tr. 208:3–213:23; Ex. 56, 8/22/2017 A. Levandowski Depo Tr. 165:9–168:2); and
 4 asked Uber to produce documents about it (RFP No. 153), which Uber has done. Waymo had the
 5 benefit of an extensive brief in which Uber laid out its inferences in detail (Dkt. 829-4) and
 6 admits *in this motion* that Uber listed the evidence then available to it in response to Waymo’s
 7 Interrogatory No. 9, which asks for Levandowski’s “reasons for downloading.” (MIL 1 at 3 & Ex.
 8 A.)² Judge Corley has excluded from evidence and further discovery Levandowski’s conversation
 9 with Travis Kalanick on March 29, 2017, and Uber will not offer any evidence of this
 10 conversation at trial. On facts *other* than this conversation, Waymo has had full discovery.

11 Permitting Uber to put on this additional evidence would not “allow Uber to reap the
 12 benefits” of the March 29 conversation. (MIL 1 at 1.) The existence of some privileged facts on a
 13 topic does not render the entire topic off-limits. *Upjohn Co. v. United States*, 449 U.S. 383, 395–
 14 96 (1981) (“A fact is one thing and a communication of that fact is an entirely different thing.”).
 15 If it were, the routine practice of producing partially redacted documents would not exist. Indeed,
 16 Waymo itself has asserted privilege over some communications related to topics it intends to
 17 present at trial, such as the Levandowski investigation. (8/31/2017 Hr’g Tr. 20:8–21:11.)

18 Nor has Uber improperly failed to disclose the bonus explanation in response to Waymo
 19 or court-ordered discovery. Waymo cites court orders and interrogatories asking about the
 20 *destruction* of files—which ask nothing about why Levandowski may have *downloaded the files*
 21 *in the first place*. (MIL 1, p. 2.) As Waymo admits, when Waymo requested that Uber list all of
 22 Levandowski’s “reasons for downloading”—Uber timely responded. (MIL 1, p. 3, Ex. A.)

23 Uber’s initial disclosures, too, were fulsome; on June 21, Uber identified eleven witnesses
 24 having “knowledge of the Project Chauffeur bonus program.” These disclosures were sufficiently
 25 specific, especially in light of the level of generality in Waymo’s own disclosures.

26
 27
 28 ² That interrogatory was served on July 14. Uber responded timely on August 14 and 24.

1 Dated: September 13, 2017

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